APPENDIX

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Excerpt from Text of Fifth Circuit Brief of Respondent, Pages 7-13

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN REFUSING TO ENFORCE THE ARBITRATOR'S AWARD.

A. The District Court relied exclusively on the arbitrator's written findings in refusing to enforce his award.

The Defendant Unions assert at pages 8-11 of their brief that the District Court went beyond the scope of judicial review of labor arbitration decisions. However, the District Court relied solely upon the facts found by the arbitrator in the award. The recitation of facts in the decision of the District Court tracks the findings of fact in the award very carefully, which facts included the circumstances of the after-discovered evidence marijuana in the grievant's car. (See arbitration award reproduced in Defendant's brief at Appendix A, pp. 29, 40, 41, 42, 43).

The findings of fact of the arbitrator were particularly detailed at page 29 of Defendant's Appendix A, as set forth below:

> "The Grievant signed a consent for the police to search his car. Officer Toney searched the Grievant's car and found a plastic scales case with gleanings of alleged marijuana. Toney sealed these items in a bag and they were placed in the Metro Narcotics Evidence Room where it remained until 9/21/83. Toney did not bother telling anyone about the gleaning of alleged marijuana, but did they were con-

> tained in his report of the incident. These items were found when the Company Attorney and one of his associates went to police headquarters to go over the case in preparation for the instant Hearing. In the process of going through the Grievant's police file (with the proper approval) with the two Company Attornies, Officer Toney found his record of the gleanings found in the Grievant's car on January 21, 1983. The gleanings were submitted to the North Louisiana Criminalistics Laboratory and a report was received dated 9/21/83 (CE-5) indicating that the substance was in fact marijuana. The cigarette found in the white Cutlass was also submitted to the same laboratory and a report was received on 2/4/83 (CE-4) indicating that the cigarette was marijuana."

At no point in the decision does the arbitrator dispute the testimony of the police officer Royce Toney or the certified report of the North Louisiana Criminalistics Laboratory that marijuana was found in the car of the grievant on the night of his arrest. Indeed, he credited the police accounts as against the account of the grievant. (Defendant's Appendix A, 42-43).

The undersigned has been unable to locate any finding of the arbitrator, crucial or otherwise, that would preclude the District Court's reliance upon the above and other findings of fact with respect to the after-discovered evidence of marijuana possession by the grievant. The arbitrator clearly failed to even consider plaintiff-employer's substantial argument that the after-discovered misconduct rendered the grievant unfit for reinstatement (See Defendant's Appendix A, 33, 47, 48).

In these circumstances, the action of the District Court in relying upon the arbitrator's findings of fact was entirely appropriate.

The scope of judicial review was properly exercised in accord with precedent of this Court.

Thus, the District Court did not exceed the scope of permissible-judicial review, but relied solely upon the decision and factual presentation of the arbitrator, an approach mandated by this Court in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). In that case this Court made the determination that reinstatement of an over-the-road truck driver, who was caught drinking liquor on duty, violated public policy. This determination was made without the necessity of finding fraud, bias or prejudice on the part of the arbitrator, a contention advanced by the defendant Unions in the instant case. Thus, if an arbitral award violates public policy, that award will not be enforced by the courts without any analysis required of fraud, bias or prejudice on the part of the arbitrator. The cases cited by the defendant Unions in their brief are not cases where it was alleged that the enforcement of the awards would violate public policy and, therefore, are distinguishable from the *Amalgamated Meat Cutters* line of cases relied upon by plaintiff employer.

B. The District Court was correct in applying the public policy exception.

It is understood that arbitration and the validity of arbitral awards is favored by the courts as a matter of national labor policy. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed 2d 1423 (1960). This Court has recognized that enforcement of an arbitration award may be denied if enforcement would violate public policy. *Amalgamated Meat Cutters, supra*; *Sea-Land Service, Inc., v. International Longshoremen's Association of New York*, 625 F.2d 38, 42 (5th Cir. 1980); *Johns-Manville Sales v. Interna-*

tional Association of Machinists, Local 1609, 621 F.2d 756, 757 (5th Cir. 1980); *General Warehouseman & Helpers v. Standard Brands, Inc.*, 579 F.2d 1282, 1292 n. 8 (5th Cir.) (en banc).

In *Amalgamated Meat Cutters, supra*, at 124, this Court restated the principle that "the public policy necessary to prevent enforcement of a collective bargaining agreement must be well defined and dominant, and is to be ascertained by a reference to the laws and legal precedents and not from general consideration of supposed public interests."

The policy consideration enunciated in *Amalgamated Meat Cutters, supra*, at 124, was that an over-the road truck driver who drinks alcohol on duty is a danger to himself and to the public, and an arbitral award which orders reinstatement is against public policy. The public policy of preventing people from drinking and driving on the public highways was found to be embodied in case law, regulations, statutory law, and common sense.

In the instant case, the grievant had been employed as a slitter/winder operator, a machine deemed extremely hazardous by the arbitrator because it features exposed sharp blades used to cut rolling coils of paper. A large number of industrial accidents involving this machine have occurred in the past at the employer's facility. The use of intoxicants, such as marijuana, alcohol or other controlled substances, unquestionably impairs the judgment and coordination of individuals, and thus increases the probability of a dangerous industrial accident involving this hazardous equipment. The company has had rules in effect for a number of years prohibiting the possession or use of intoxicants, narcotics or controlled substances in the plant or on the plant premises. Evidence of a drug problem had surfaced at the plant and the employer had taken steps to warn the employees of the existence of the rule prohibiting drug use and possession, and had taken steps to catch offenders.

These rules and concerns are in accord with national policy as exemplified by the Occupational Safety and Health Act 29 U.S.C., Sec. 651-678, particularly Section 654, which states as follows:

> "(a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.
>
> "(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."

In addition to the clearly stated national safety and health policies, the criminal laws of the State of Louisiana at La. Rev. Statutes 40:966(D) provide that the use or possession of marijuana is a criminal act, a clear embodiment of public policy in this State.

Another consideration of public policy involved is that reinstatement of this hazardous machine operator who violated the rules against the use or possession of marijuana on company premises will operate to encourage other employees to violate the employer's rules and further increase the drug and safety problems at the plant. This factor has been recognized by this Court in a case involving thievery in *NLRB v. Big Three Welding Equipment*, 359 F.2d 77, 82-84 (5th Cir. 1966), where it was stated that "reinstatement in such circumstances could well be an invitation to continue such misconduct

on the part of the reinstated employees, as well as others." And in *U.S. Postal Service v. American Postal Workers Union*, 736 F.2d 822, at 825 (1st Cir. 1984), the Court recognized that the impact on other employees of the dishonest employee's reinstatement may be to encourage dishonesty.

The Defendant Unions' position would require an *admission* by the grievant of drug use or possession before the *Amalgamated Meat Cutters* public policy exception could apply. However, as shown *supra* the arbitrator's findings of fact clearly accepted as true the neutral accounts of the police and the North Louisiana Criminalistics Laboratory that marijuana was discovered during a lawful search of the grievant's car on the company premises. Moreover, the arbitrator did *not* specifically credit the grievant as against the police accounts.

The District Court's decision was consonant with the findings of fact of the arbitrator in its determination that the award should not be enforced for public policy reasons.

It is submitted that the public considerations in the instant case warrant affirmance of the District Court's refusal to enforce the arbitration award on the authority of *Amalgamated Meat Cutters, supra.*

CONCLUSION

Based on the foregoing, and the entire record, the plaintiff employer submits that the scope of judicial review exercises by the District Court was proper and that the public policy exception to enforcement of an arbitration award clearly applied to this case. Further, in view of the finding by the District Court, it cannot be said that the employer's refusal to abide by the arbitration award was without justification, and no attorney's fees should be levied regardless of this Court's decision on the merits.

Respectfully submitted,

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CERTIFICATE

I hereby certify that an exact copy of the above and foregoing has this date been mailed to all counsel of record by placing same in the U.S. Mail, postage prepaid, this 19th day of February, 1985.

/s/ A. Richard Gear
A. RICHARD GEAR